United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7217

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

COMMERCE TANKERS CORPORATION,

Defendant-Counterclaimant-Appellant,

and

VANTAGE STEAMSHIP CORPORATION,

Intervening Defendant-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Plaintiff-Appellee.

VANTAGE STEAMSHIP CORPORATION,

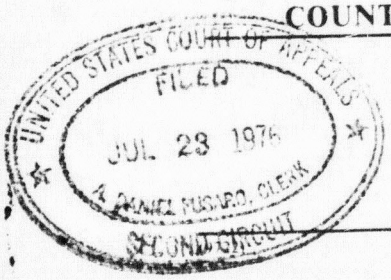
Plaintiff-Appellant,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

BRIEF FOR DEFENDANT-COUNTERCLAIMANT-APPELLANT



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In The

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Docket No. 76-7223
Consolidated with
Docket No. 76-7217

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NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT

STATEMENT OF THE CASE

In early 1971, an attempted sale by appellant Commerce Tankers Corporation ("Commerce") of its last remaining vessel, the S.S. BARBARA to appellant Vantage Steamship Corp. ("Vantage") was blocked by the appellee National Maritime Union ("NMU") which obtained an arbitral award and preliminary injunction enforcing certain contractual clauses. The injunction, later reversed, was conditioned on the posting of a $10,000 bond by the NMU. In the District Court, Commerce and Vantage each sought damages against the NMU suffered after frustration of the sale. After trial, Hon. Thomas P. Griesa found that Commerce's damages were "caused by the injunction" — and limited recovery to $10,000, the amount of the injunction bond. This is an appeal from that determination by the District Court and the judgment entered thereon.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the District Court err in denying to Commerce a judgment against the NMU under the antitrust laws in that:

(i) the restraint-on-transfer agreements constituted a group boycott in violation of the antitrust laws and outside the scope of any labor exemption under the clear meaning of the Supreme Court decision in *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local No. 100,* 421 U.S. 616 (1975);

(ii) the restraint-on-transfer and related industry-wide pension contributions clauses were negotiated by the NMU with certain employers on condition that they be imposed on an industry-wide basis; and

(iii) these illegal agreements were directly responsible for the damges caused to Commerce and cannot be

excused by the NMU's having succeeded in persuading one federal district court judge to issue an erroneous order requiring "preliminary" compliance therewith.

II. Did the District Court err in limiting Commerce's recovery against the NMU for the wrongful injunction to the amount of the injunction bond ($10,000)?

III. Did the District Court err in failing to consider the constitutionality of Rule 65(c), Federal Rules of Civil Procedure, as applied, to so limit damages?

IV. Did the District Court err in denying to Commerce a judgment against the NMU under Sections 301 and 303 of the Labor Management Relations Act ("LMRA") 29 U.S.C. §§185, 187 by reason of the NMU's unilateral adoption and enforcement of the secondary boycott provisions against the will of Commerce?

STATEMENT OF FACTS[1]

In the maritime industry a unique rule of labor relations, developed over many years and applicable to most employers, required each employer to use a crew of seamen represented by a single union on its entire fleet of vessels including newly acquired vessels. *Moore McCormack Lines, Inc.*, 139 N.L.R.B. 796 (1962); *National Maritime Union* (Overseas Carrier Corp.), 74 N.L.R.B. No. 36 p. 216, 70 LRRM 1153 (1969). In 1969-70, the NMU and a group of affiliated supervisory unions negotiated contractual clauses referred to in the District Court opinion in this case as "restraint-on-transfer" clauses. By the restraint-on-transfer agreements, NMU employers effectively agreed with the NMU not to sell their United States flag vessels

1. Commerce believes that the District Court opinion erroneously omits a detailed description of the essential facts. To redress the err, Commerce timely moved pursuant to Rule 52(b) to request the Court to make some sixty additional or amended findings of fact. The District Court rejected the 52(b) motion, making it necessary and appropriate to commence this appellate brief with a detailed description of the facts.

to competitors in the coastwise trade unless the purchaser agreed to continue the NMU crew and contract. Since approximately one-half of the employers in the maritime industry had lawful fleetwide agreements with unions other than the NMU, these employers became "ineligible" to buy NMU vessels.

The Genesis of the Restraint-on-Transfer Provisions

By 1967, employers in the maritime industry were aware that pension obligations which they had undertaken to the NMU and other maritime unions were underfunded to the extent of many millions of dollars (1404a). A pension funding scheme was thereupon effected whereby all employers associated with the AFL-CIO maritime unions whose fleet of vessels had an average age of more than twenty years contributed to the pension plans on a 15 year funding basis whereas employers with the newer vessels would fund the plans on a 25 year (the lower rate) basis (1405a). Although this system was privately negotiated with the unions by Mr. Edward Silver, chief spokesperson for the Maritime Service Committee ("MSC") and Tanker Service Committee ("TSC"), the District Court found that it was not evidence of illegal "motivation" by the employers because *one* MSC member was shown to be subject to the higher rate and some independents, including Commerce, were qualified for the lower rate (1406a).

The 1967 pension funding provisions did not satisfy the NMU because it was losing vessels on sale and transfer (E54-55). Mr. Joseph Curran (then the President of NMU) wrote to Silver complaining of the need "to bring stability to the industry so that these pensions would be secure" and demanding that "there must be a procedure established for protecting our contracts where vessels or companies are transferred." *Id.* On February 1, 1968, Silver responded suggesting that a meeting be held at the earliest convenient time (E57). At the same time, the Marine Engineers Beneficial Association ("MEBA") was complaining to Mr. Silver of the "severe impact on MEBA's pension plan and

other interests stemming from the sale of vessels to non-MEBA contracted companies" (E52). The President of MEBA, Mr. Jesse Calhoon ("Calhoon"), wrote to Silver asking further meaningful discussions of the issue "before we can consider your [Mr. Silver's] suggestion of a contract extension through joint meetings of the several unions. *Id.* Mr. Silver denied that he ever suggested joint meetings of the several unions.

On May 31, 1968, MEBA obtained a restraint-on-transfer provision from seven dry cargo companies comprising the membership of the MSC (E22-23). In that agreement, executed on behalf of his clients by Mr. Silver, the MSC companies agreed not to sell their vessels to any other American flag purchaser unless the purchaser agreed to continue the MEBA contract. Although MEBA would clearly lose the jobs and lose the pension contributions which came with the jobs if a vessel under contract with MEBA was sold to a foreign flag purchaser, the agreement reached with MSC in 1968 permitted an unrestricted sale to foreign flag owners. When asked about the purpose of this whole arrangement, Mr. Silver gave the following testimony:

> "Q. If a MEBA vessel, prior to May 31, 1968, was sold to another party, another operator of the U.S. flag vessels, which had a pre-existing agreement on the rest of its already owned vessels with BMO covering engineers, what would have occurred with respect to who would represent the engineers on the buyer's vessel after the transaction? A. I have no idea.[2]
>
> Q. Did you have any idea in May of 1968? A. It never came up.

---

2. Mr. Silver, principal labor law partner of a prestigious firm, was shown to have personally agreed to fleetwide agreements containing accretion clauses with MEBA, NMU, and other unions.

Q. Wasn't that the whole basis for the request, Mr. Silver, that Mr. Pressman was making at the time that we want to stop losing vessels to other collective bargaining organizations? A. I don't recall him saying that. What he said was he wanted to make sure that in the future if a vessel was transferred that his organization would continue to represent the engineers on board that vessel.

Q. Prior to May of 1968 had they not continued to represent the engineers? A. I don't know.

Q. You know of no instance in which that occurred? A. I know of no instance either way. I don't recall an example.

* * *

THE COURT: If the prospective buyer had a contract with a rival organization, there would not realistically be any way they could buy and give the undertaking, could there?

THE WITNESS: It depends on what their contractual commitment was to that organization with whom it had a contract.

* * *

THE COURT: I take it that some of the maritime unions had contracts with companies which provided that even later acquired vessels would have to be covered?

THE WITNESS: That's true.

THE COURT: And if they had that kind of contract they cannot comply —

THE WITNESS: It would present a real problem.

THE COURT: They could not make the sale.

THE WITNESS: They cannot make the sale to such a company if they could not get an undertaking from that company that it was going to continue to recognize the MEBA, that's correct." (544-47a).

The NMU's concern with the adequacy of the contributions to its pension and welfare plans was raised again in October of 1968. Mr. Curran wrote to Mr. Silver, suggesting a plan which would have had the employers in the industry contribute to the plan based upon some index (*i.e.*, power/tonnage) of their potential gross earning capacity (E46). In the first few days of December 1968, Mr. Silver and Mr. Curran were to discuss this proposal at a meeting held in a hotel room in Boca Raton, Florida (553a). On December 6, 1968, Curran again wrote to Silver setting forth the NMU's principal proposals including on pensions, "a guaranteed funding program." (E49-50). Mr. Silver denied having any recall as to whether there were MSC-TSC negotiations with the NMU during this period (551a).

In December of 1970, representatives of the various employee organizations met in Miami, Florida. Mr. Silver denied knowledge of these meetings despite the documentary evidence that they were held at his suggestion and "at the request of the companies" (599a). There were follow-up meetings in New York, at least between the representatives of MEBA and NMU. Mr. Silver denied there was any MSC-TSC participation (597a). Mel Barisic, Secretary-Treasurer of the NMU, testified otherwise (401-03a). Mr. Silver admitted being told by Mr. Calhoun or Mr. Pressman that as a consequence of these meetings, MEBA

had developed the concept of industry-wide guarantees for pension contributions (583-84a).

Some time before the official "opening" of the 1969 negotiations, a document was prepared stating that the number I condition for the commencement of negotiations for the 1969 contract posed to TSC and MSC was that "the companies" agree that the restraint-on-transfer clauses be available to, if desired by, the NMU and other unions (E68).

Negotiations of the economic terms of the 1969 NMU contract were held in April through July. On July 16, 1969 the NMU arrived at an economic package with the MSC and TSC which included a 44 million dollar industry-wide annual pension guarantee with contributions to be made on a per man, per day basis. Industry-wide pension guarantees were also included in the officer-union contracts. The acknowledged agreement by the NMU with TSC and MSC required the union to enforce the identical pension contribution scheme upon independents. If the NMU had failed to do so, then the entire burden of the 44 million dollar guarantee would have fallen upon the MSC and TSC companies. Commerce agreed in writing to the economic terms, presented to it on a take-it or leave-it basis.

In the fall of 1969 the NMU reached agreement with the MSC and TSC on the restraint-on-transfer clause. According to the testimony, the agreement — on this number I "condition" to the negotiations was left for the last, and when ultimately reached was made *orally* only. The District Court accepted the NMU's belated[3] testimony that the union's failure to have secured the restraint-on-transfer agreements in writing was due to mere oversight (1413a).

3. It cannot be overly stressed that NMU counsel originally represented that the agreements were in writing; that as late as the trial, NMU counsel "pretended" that the Commerce agreement was lost, but that the NMU had signed restraint-on-transfer agreements with all the other employers (415a, *et seq.*). Only when repeatedly pressed to produce these agreements did the NMU admit that no such signed agreements existed as of January 1971 when the NMU "enforced" the understanding against Commerce (979-81a).

In February of 1970 the NMU circulated a printed book version of its new contract to all employers. These books contained the restraint-on-transfer provisions. At the time they were distributed, no accompanying letter was sent out, no request for signature of the employers was made, and no form of acquiescence by Commerce or any other independent employer was asked for or received. Commerce reasonably assumed that it was forced to accept the entire bluebook, lest it be willing to face the prospect of having the operation of its vessels interrupted by job action (E107-110). In no way, shape or form was Commerce's (or any other independent employer's) attention directed to the restraint-on-transfer clause or to the unprecedented (and unstated) NMU right to use the provision to enjoin the employer's sale of its vessels.

The Disruption of the Sale of the BARBARA

In October, 1970, Vernitron Corporation ("Vernitron") determined that a sale of certain assets was financially necessary. Vernitron's sole involvement in the shipping business was through Commerce, a wholly-owned subsidiary. Vernitron, a publicly-owned company, issued a public release stating its intention to go out of the shipping business. The President of Commerce, one Milton Pilalas ("Pilalas"), was himself a potential purchaser of Commerce's vessels. Accordingly, the responsibility for the sale of the vessels fell upon officers of Vernitron with no prior familiarity with or involvement in the maritime industry (682-83a).

On December 21, 1970, Commerce arranged for the sale of one of the vessels, the S.S. THALIA, for a purchase price of $3,050,000. Fortuitously, no labor problem was involved in the sale of the THALIA which was made to a company which had a pre-existing collective bargaining arrangement with the NMU. On the evening of December 22, 1970, representatives of Vernitron—Commerce met with representatives of Vantage, which was interested in acquiring Commerce's other vessel. At

this meeting a contract of sale was essentially agreed upon. During the course of the meeting there was a very brief discussion concerning labor problems in which Mr. Philip Corletta ("Corletta"), President of Vantage, informed the representatives of Vernitron-Commerce that Vantage had three of the same four unions representing men employed upon Commerce's vessels. In a disputed conversation, Corletta also stated that he had the SIU or "the other union" (970a) with respect to unlicensed seamen, and that Vantage would "take care of" any labor problems resulting from delivery of the vessel to it (347-49a, 857-59a).

The representatives of Vernitron-Commerce went along with the sale unaware that the vessel BARBARA was entering into unchartered legal waters. Vernitron made a prompt public announcement of the sale of the Commerce vessels and reports thereof, including those which identified Vantage as the buyer, appeared in the public press from which the NMU learned of the transaction (1417a).

On Monday, January 11, 1971, the NMU, although aware of the commercial divorce between Pilalas and Vernitron, wrote to Pilalas reminding him of the restrictions of the restraint-on-transfer clause. On Wednesday, January 13th, Pilalas responded to the NMU letter advising them that representatives of Vernitron had arranged for the sale of the vessels; that the NMU had continued on the THALIA post-transfer and that so far as he knew, the same unions would be continued on the BARBARA.[4]

On January 25, 1971, the NMU contacted Vernitron for the first time and demanded an immediate arbitration of the dispute arising under the NMU collective bargaining agreement. The

4. The NMU was to claim that it was misled in some manner by the Pilalas letter. This claim is without support in the record. As early as January 7, 1971, the NMU realized that a forbidden transfer of an NMU vessel to "a SIU company" was in the process of happening.

arbitration was fixed for February 8, 1971. On Thursday, February 4th, Commerce demanded of Vantage that it "take care" of the problem arising from the NMU claim for representation rights. Although the vessel then was in New York, Commerce refused to transfer it to Vantage without an express assumption by it of the labor problem (E66).

On February 8, 1971, the industry-wide arbitrator, rejecting Commerce's request for 72 hours to brief the issues and establish a record bringing them "into focus," enforced the NMU restraint-on-transfer clause after a no-witness, no-transcript, 20 minute "proceeding" (362-65a). The arbitrator issued an arbitral award of injunction forbidding Commerce from selling or transferring the vessel to Vantage without first obtaining Vantage's undertaking that it would retain the NMU crew and contract (E16). On February 9, 1971, the NMU commenced 71 Civ. 582 seeking judicial confirmation of the arbitral award of injunction relief and obtained on *ex parte* application before District Court Judge Inzer B. Wyatt, a temporary restraining order enforcing the arbitral award of injunctive relief on the posting of a $10,000 injunction bond.

On February 16, 1971, Vantage moved before Judge Wyatt to intervene in 71 Civ. 582 and to vacate the temporary restraining order. On February 18th, Commerce filed its motion papers supporting Vantage's motion and urging denial of the NMU's petition. After extensive oral argument held on February 18th, Judge Wyatt determined on February 19th to permit Vantage to intervene and further held:

> "Commerce and Vantage raise a serious question whether the provision in the Commerce-NMU agreement violates the antitrust laws. It is said to be one of first impression and that the provision itself first came into being in 1969. Certainly, the provision restricts, in practical effect, the sale of the vessel to those United States flag operators

who have agreements with NMU or to foreign flag operators. The vessel cannot be sold to anyone who, like Vantage, has an agreement with SIU or another union. Commerce and Vantage ought to be able to litigate the issue.

On balance, I am persuaded that Commerce and Vantage will suffer from the restraining order much more than the NMU will suffer if it is dissolved.

It is my intent that NMU be able, if it succeeds in the litigation, to be in the same position it would be in were the award to be presently enforced.

A sufficient bond will be posted to cover contributions to the NMU pension fund[5] for the time the BARBARA is not operated under the Commerce-NMU agreement.

An undertaking will be filed by Vantage that if NMU succeeds in this action, Vantage will put NMU in the same position it would have been in had the restraining order been continued, including representations by Vantage to the NLRB appropriate to the purpose.

Upon compliance with these conditions the restraining order will be dissolved." (57a).

On the night of Monday, February 22, 1971, Judge Wyatt signed an order based on his memorandum decision. Vantage immediately filed an undertaking to comply with the NLRB determination of the jurisdictional controversy (58a). Commerce

5. In fact, by reason of the industry-wide guarantee, the NMU would not have lost a single penny in pension contributions if the vessel had been transferred to Vantage, but NMU did not disclose the industry-wide guarantees to Judge Wyatt and claimed $278,000 would be lost.

was prepared to file a financial bond covering one-half of the $278,000 financial bond required. Vantage was not prepared to do so that night (1421a).

On February 23rd, the NMU's petition for confirmation of its arbitral award of injunctive relief came on to be heard before District Judge Marvin Frankel. On the 22nd, NMU counsel filed an affidavit seeking a "preliminary injunction." (64a). At oral argument Judge Frankel orally "reversed" Judge Wyatt's written determination and "revived" the TRO. On February 24th and 25th, Judge Frankel entered written TROs (82a, 84a). On March 2nd, Judge Frankel rendered his decision granting a preliminary injunction, although postponing a final decision on the motion to confirm for "reasons of at least a technical nature."

To support the preliminary injunction, Judge Frankel "found," on the basis of the NMU's unanswered affidavit of February 22nd and assertions at oral argument that:

I. Under its collective bargaining agreement with NMU Commerce promised not to transfer either of its two ships unless the purchaser agreed to assume the obligations of the union contract (93a). (In fact, upon trial, it was shown that Commerce made *no* such promise.)

II. Having no doubt about the meaning of this provision (Article I, Section 2) Commerce decided in October to sell its vessels and proceeded in secret (95a). (Again, the facts were shown to be otherwise: Commerce *publicly* announced its intention to sell and sale of its two vessels and never acted in contravention of a *recognized* obligation.)

III. Pilalas' response to the NMU demand was "seemingly inaccurate if not intentionally misleading" (96a). Upon full trial, the District Court found Pilalas truthfully was not involved in the sale (1415a).

IV. The defendant, along with others, has had 20 months or so in which to seek the Labor Board's authoritative judgment as to whether the disputed provision of the June 1969 agreement is unlawful (102a). (The facts at trial demonstrated that Commerce did not know of the existence of the clause until at least February of 1970, was never asked to sign or otherwise agree to it, and did *not* realize until the litigation ensued that its practical effect was to restrain the sale of the vessels.)

Judge Frankel concluded that there was "an overwhelming probability" for confirmation of the arbitrator's award and issued the preliminary injunction enforcing it. Although granting "temporary" relief, he conceded that "the practical effect may well be final, the contract for sale of the vessel and the intervenor's obligation to deliver it to a charterer are due for execution hours from now . . ." (107a) with "the further result . . . a preliminary injunction which may not be subject to the always desirable benefit of appellate review, whereas a *nisi prius* decision timely sought may well have had such scrutiny" (109a).

Judge Frankel conditioned the preliminary injunction on the posting of a $10,000 bond. The NMU simply continued the undertaking filed on the TRO issued by Judge Wyatt (17a).

Faced with that kind of overwhelming defeat before Judge Frankel, Commerce decided not to seek immediate appellate review of the order of preliminary injunction, but rather to pursue the avenue of getting the NLRB Regional Director to file unfair labor practices against NMU.[6] On numerous occasions, Commerce's principals and counsel made visits to the Regional Director to get it to proceed with all due deliberate speed in commencing an unfair labor practice proceeding and it was

6. Judge Frankel granted that the District Court's view was less authoritative than the view the Labor Board may ultimately take. An additional factor in this choice by Commerce was Judge Frankel's opinion assuring the NMU that confirmation of the arbitral award of injunction was available as soon as Vantage's answer was filed.

assured on two of those visits, that such a proceeding would soon be instituted (822-27a).

In the meantime, Commerce attended to its *first* duty: that of attempting to resell the vessel to a party which could comply with the NMU undertaking. Vantage continued to formally insist upon the delivery of the vessel (1423a). On March 10, the last attempt by Commerce and Vantage to settle their differences by negotiation failed. On March 11th, the charterer, citing "union problems and the injunction," cancelled the charter (1423a). Commerce's attempt to get a state court order of immediate arbitration with Vantage also failed on March 10th, so Commerce moved on March 12th before Judge Frankel for resettlement of the March 4th order to include a provision explicitly stating that Vantage was not permitted to purchase the vessel except in compliance with the District Court's prior order. On March 24th, Judge Frankel refused Commerce's requested relief (134a).

Thus, caught with a continuing contract to sell a vessel to a purchaser which was not lawfully able to buy it in accordance with the terms demanded by a federal court order, Commerce made a final attempt to solve its problem through negotiation with the union. On March 29th Commerce telegraphed the NMU advising it that all efforts to obtain a United States flag operator to purchase the vessel had been unsuccessful and that since the choice appeared to be between a sale to Vantage or to foreign flag operators, Commerce offered to drop all labor and antitrust challenges to the clause if allowed to tender the vessel to Vantage (E59). The NMU refused permission. The NMU President stated that allowing the vessel to remain in the coastwise trade would permit it to be in "*competition with existing NMU companies and vessels that were still struggling . . .*" (E117) (emphasis added).

Subsequent Events

Subsequently, the market for United States flag vessels suffered a precipitious drop. Commerce was unable to sell the vessel until nearly a year later and at that time received only $700,000 for it. Commerce also received from Vantage (and credited against its claim versus the union) an additional $700,000 in settlement of a complex commercial arbitration and litigation resulting from the NMU's frustration of the sale. Commerce's losses due to depreciation of the value of the vessel alone thus amounted to $1,350,000 and at trial Commerce schedulized approximately $200,000 of additional expenses incurred while the vessel was unsold.

On May 24, 1971, the Regional Director of the NLRB filed unfair labor practice charges against the NMU[7] and a complaint seeking an injunction pursuant to Section 10(L) of the NLRA, 29 U.S.C. §160(L) to cause the NMU to cease and desist from enforcing the restraint-on-transfer clause. Three days later, Commerce filed, by order to show cause, a motion pursuant to Rule 62(c) of the FRCP seeking vacation of the preliminary injunction granted by Judge Frankel in view of this new event (135a). The 62(c) motion was referred to Hon. Thomas F. Croake, along with the 10(L) complaint. On June 4th, Judge Croake held an evidentiary hearing on the combined motions. On June 22nd, Judge Croake (erroneously) denied the Regional Director's petition for a 10(L) injunction, but indicated the Court's intent to grant Commerce's 62(c) motion (159a). The NMU then moved for reargument of the 62(c) motion. On July 15th (without any reargument), Judge Croake decided not to grant the 62(c) motion on the grounds that the Court lacked "jurisdiction" to modify an interlocutory order as to which an appeal was pending (183a).

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7. These charges were later amended to include a claim that Commerce "voluntarily" enforced the clause. In fact, Commerce was ultimately held by the NLRB to have enforced the illegal 8(e) agreement. *Commerce Tankers Corp.*, 196 N.L.R.B. No. 165, 80 LRRM 1198, 1199 (1972), *enf'd sub nom. NLRB v. National Maritime Union*, 486 F.2d 907 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).

During the pendency of the unfair labor practice charges and the Rule 62(c) motion, Commerce had, with the consent of the NMU, thrice adjourned its time for filing its appendix and brief on appeal (for the obvious reason that no appeal *by Commerce* would have been necessary if Judge Croake had decided the 10(L) motion favorably to the Regional Director or if he had granted the 62(c) motion). When faced by Judge Croake's turnabout, Commerce immediately moved by Rule 8 motion before the Court of Appeals for a lifting of the order of preliminary injunction or, in the alternative, the fixing of a bond requirement in excess of the $10,000 which had been set by Judge Frankel.[8] In response to the Rule 8 motion, the NMU argued that Commerce not be granted relief because of its delays in prosecuting the appeal. In reply, Commerce cited the peculiar history of the unfair labor practice charges and the Rule 62(c) motion *and Commerce suggested* to the Court that if it was persuaded by such argument, it could fix an expedited appeal schedule with which Commerce would be more than willing to comply. The Regional Director also noticed its appeal from Judge Croake's ruling, later consolidated with Commerce's appeal from Judge Frankel's ruling. On August 17th, Commerce moved for 60 additional days to file its brief and appendix for the appeal in order to *incorporate the determination of the Rule 8 Panel* and the decision of the NLRB trial examiner before whom a trial had been had on July 6, 1971. On August 19th the Rule 8 Panel denied "without prejudice" Commerce's initial motion for vacation of the preliminary injunction or a higher bond, except to the extent of granting the application of expedited appeal. All parties complied with the expedited schedule. Oral argument on the appeal was heard on October 7,

8. It bears note that Vantage, which lost the commercial arbitration to Commerce in July 1971, thereafter indicated a renewed desire to purchase the vessel "if it could be guaranteed the right to operate with an SIU crew." A foreign flag purchaser was also interested in the vessel at this time, but its interest disappeared when the NMU would not assure it that the purchaser's United States facilities would not be picketed in the event of such a purchase. The District Court held, in effect, that the NMU was not required to give any such guarantees to foreign flag purchasers, who admittedly were exempt from the restraint-on-transfer provisions (1427-28a).

1971. On March 22, 1972, this Court reversed both Judge Frankel's order of preliminary injunction and Judge Croake's denial of the Regional Director's application pursuant to Section 10(L). *National Maritime Union v. Commerce Tankers Corporation*, 457 F.2d 1127 (2d Cir. 1972).

SUMMARY OF ARGUMENT

Secondary boycotts by labor unions are an evil which have been rightly condemned by Congress and the courts. If a union can extend its jurisdiction and power by precluding contracted employers from dealing with other employers, it will be the death knell to the concept that *employees* be permitted to select the collective bargaining representative of their choice and critically to the issues at hand would allow the concentration of industrial power in the hands of a few employers and a few unions.

The evidence in this case proved that the NMU and the MSC/TSC employers who agreed to the NMU restraint-on-transfer provisions had no objection to increasing their respective power by creating barriers to entry to the market for the carriage of cargoes in the coastwise trade and effectively forcing certain vessels, including the BARBARA, out of that trade.

The judgment of the District Court would nevertheless exempt the NMU from liability for the damages resulting from the illegal secondary boycott by holding that (i) there was no evidence of specific anti-competitive motive by the employer groups; (ii) Commerce, which was not given the opportunity to accept or reject restraint-on-transfer, in effect "ratified it" by silent acquiescence; and (iii) one Federal District judge made an erroneous *preliminary* ruling upholding its validity and Commerce did not seek expedited appeal from that preliminary ruling (although Commerce did urgently seek to reverse the fact of the injunction by proceedings before the agency charged by Congress with *exclusive* jurisdiction over claims of secondary boycott).

In this brief, it will be shown that on each count the District Court proceeded on an erroneous premise that Commerce should be denied relief if any possible hypothesis foreclosed recovery. Thus, the District Court speculated that expedited appeal from the original order of preliminary injunction would have resulted in reversal of that order in time to save a valuable charter; that the MSC/TSC owners had agreed to restraint-on-transfer without recognizing the direct relationship to the simultaneously agreed to industry-wide pension guarantees; and that the independent owners also would have been voluntary participants in the illegal combination if the NMU had not, by "oversight," neglected to consult them.

The District Court's speculation is neither just nor justified. No less a consideration than our constitutional commitment to due process of law obligates this Court to reverse the judgment below setting aside the District Court's limitation of damages to the $10,000 bond and remanding the case to the District Court with appropriate guidance as to the principles of law to be applied.

POINT I

THE DISTRICT COURT ERRED IN DENYING TO COMMERCE A JUDGMENT AGAINST THE NMU UNDER THE ANTITRUST LAWS.

The opinion below states that the Court "found against the factual contentions of Commerce of alleged combination or conspiracy by the larger shipping companies to enhance their financial and competitive position" by the agreements respecting the restraint-on-transfer clause and industry-wide pension contributions and that although "that leaves open the question as to whether the restraint-on-transfer clause amounted to *per se* violation of Sherman Act §1" it is inappropriate and unnecessary to decide that issue because "the proximate cause of the delay and final frustration of the S.S. BARBARA

transactions was the preliminary injunction issued by Judge Frankel . . . " (1431-32a). Commerce contends that the District Court erred in that the agreements were proven to be *per se* violations of the antitrust laws *and* that the antitrust violation was a material cause of at least a substantial part of the losses which Commerce suffered.

Group Boycotts are Outside the Labor Exemption

The United States Supreme Court has directly held that agreements between unions and employers which impose *direct* restraints on competition in the business market are not immune from antitrust sanctions, notwithstanding lawful "goals." *Connell, supra,* p. 2, 421 U.S. 616, 625. In *Connell,* the Court found that a union's agreement with a group of contractors which precluded subcontracting to any firm that did not have a collective bargaining agreement with the union was beyond the shelter of the federal policy favoring such agreements because, *inter alia,* "this kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the limitation of competition over wages and working conditions." *Id.*

Similarly, the restraint-on-transfer clauses directly restrained Commerce and other NMU contracted employers from transferring their vessels to competitors in the coastwise trade, unless those competitors were willing to retain the crew *and contract*[9] of the NMU and an affiliated group of supervisory unions. As such, agreements the NMU made effectively forbade transfer of vessels to SIU or non-union operators, regardless of whether or not the purchaser's competitive advantages were derived from substandard wages or working conditions. That kind of direct restraint on competition is so clearly beyond the limits of the labor exemption spelled out by *Connell* that the failure of the District Court to so find is simply inexplicable.

9. The written undertaking required the purchaser to comply with all of the terms and provisions of the NMU agreement (E18). One of the terms was fleetwide representation of the NMU. Another was industry-wide pension funding.

In the instant case, Commerce, a willing seller, was unable to transfer the business of operating a vessel in the coastwise trade to Vantage because Vantage was among the group of "boycotted" employers.[10] The incredible testimony of the MSC-TSC's principal negotiator to the effect that he did not realize the impact of the restraint-on-transfer provisions does not excuse the group boycott. In any event, the record demonstrates full well that the NMU knew what it was doing. When Shannon Wall, current President of the NMU was asked why he would rather the vessel go foreign rather than to the rival union SIU, he pointed out that if the vessel was permitted to remain in the coastwise trade, "it would be in competition with existing NMU companies and vessels that were still struggling . . . for cargoes," *supra*, p. 15. Such anti-competitive thinking exemplifies the reason why group boycotts are a *per se* violation of the antitrust laws. See generally, *Klor's Inc. v. Broadway-Hale*, 359 U.S. 207 (1965).

No cognizable reason in law has ever been advanced as to why the oral agreement made by the NMU with Mr. Silver on behalf of the MSC/TSC companies not to transfer their vessels to competitors in the coastwise trade is not a *per se* illegal group boycott, and certainly none is contained in the District Court's opinion.

The Illegal Industry-Wide Basis of the Agreements

The law is clear that a union may make agreements with multi-employer bargaining units and then in furtherance of its own interests seek to obtain the same terms from other employers. But, when a union agrees with one set of employ-

10. The particular target of this conspiracy was shown to be those employers who, like Vantage, had pre-existing fleetwide bargaining agreements with the Seafarers International Union ("SIU"). Clear anti-SIU motivation appears in the record in this case, and was previously relied upon by this Court. *National Maritime Union v. Commerce Tankers Corp.*, 457 F.2d 1127, 1130 (1972). Curiously, if Vantage had been willing to operate the vessel outside of the coastwise market, it could have purchased the vessel without retaining either the NMU crew or contract.

ers to impose terms and conditions on other employers, it forfeits its antitrust exemption. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). If such extra-unit agreements specify standards that are ruinous to the business of the affected employers, the union is liable under the antitrust laws for the damages thereby caused. *Ramsey v. United Mine Workers*, 401 U.S. 302, 313 (1971). See also *Ramsey v. Mine Workers*, 344 F.Supp. 1029, 1033 (E.D. Tenn. 1972).

Mr. Silver's agreement with the NMU imposing the restraint-on-transfer clauses was only made orally so that it is impossible to know with a certainty whether the MSC/TSC agreement was conditioned upon the clause being imposed upon independents. The District Court opinion ignores this crucial factual issue. All of the evidence, however, compels the conclusion that such a condition was, implicitly or explicitly, a part of the understanding.

The District Court found that "one of the reasons why the *unions* demanded the restraint-on-transfer clause from all the companies" was the unions' desire to maintain the pool of contributors to the union pension funds (1414a). The District Court thus accepts the evidence that the parties used the restraint-on-transfer provisions to preserve the stability of the simultaneously agreed to industry-wide pension funding provisions, but refuses to conclude that the MSC/TSC employers understood that what they were doing resulted in a direct monetary benefit to the owners (compare 634-39a).

The first restraint-on-transfer clause in the maritime industry had been agreed to by seven MSC companies on May 31, 1968. The people who worked that out were Mr. Silver, Mr. Pressman, MEBA's General Counsel, and Mr. Lee White, another attorney and President of a shipping company.[11] The same men discussed industry-wide pension guarantees that were later included in the NMU, MEBA, and other union contracts.

11. Both Mr. Pressman and Mr. White were deceased at the time of trial.

The funding for the NMU guarantees alone amounted to 44 million dollars per annum. When asked by the Court: "What was the agreement about the $44,000,000? Who was to pay it?" Mr. Silver responded:

> "As I understood it, I was representing TSC and MSC, but the NMU signatory companies, companies that had contracts with NMU, would agree that over the period of the contract each year it would put enough money in to produce the $44 million." (621a).

It is impossible to believe that the MSC/TSC employers would agree to a 44 million annual obligation to the NMU which *they alone* would fund. On the uncontested evidence, it was Mr. Silver's actual understanding that the NMU would require all of its contracted employers to participate in the industry-wide funding scheme. If independent company participation in the funding could be terminated by the simple device of transfer of vessels to non-NMU contracted companies, then the scheme would obviously fail. Although Mr. Silver denied that this was discussed, the only real choice independents were permitted under the 1969 NMU agreements was to scrap their vessels or transfer them foreign—in either event out of the coastwise trade. Many, many vessels were transferred out of the coastwise market (E69 *et seq.*). Practically all of the vessels so disposed of were of the same vintage (post-World War II–more than 20 years old) as the BARBARA. Whatever the motives of the MSC/TSC and the NMU may have been, one thing is for certain: they certainly succeeded in establishing conditions ruinous to the business of the independent operators.

The Maritime Administration, in the *amicus* brief previously filed with this Court, stated in pertinent part:

> "(1) The vessels and operators affected by the [NMU] restrictive provisions comprise some

50 percent of the American Flag fleet if only the unlicensed personnel are taken into account[12] (Mar. Ad. Brief, p. 17);

(2) The clause in question effectively denies American carriers the right to sell or buy ships in about one-half of the possible market (Mar. Ad. Brief, p. 17);

(3) For the NMU contracted operator, the effect of the clause is to depress the price of his ships and to encourage their sale abroad (Mar. Ad. Brief, p. 18);

(4) If substantial numbers of American-flag vessels were to go under foreign flag, the increased costs of doing business imposed by increased contributions to the pension fund[13] *would drive smaller companies out of business or force them to foreign registry*" (Mar. Ad. Brief, p. 26).

Motivation

At the Trial Court, Commerce argued that it was not required to prove specific anti-competitive motivation on the part of the MSC/TSC employers in order to succeed in this antitrust action. The NMU argued otherwise. Commerce was correct. The Supreme Court opinion in *Connell* dictates that even "lawful goals" do not immunize against antitrust attack illegal direct restraints on competition included in collective bargaining agreements 421 U.S. at 625.

12. When the restrictions of all of NMU, MEBA, and MMP contracts are taken into account, the number of potential American flag buyers for the BARBARA was reduced to a literal handful.

13. Under the NMU formula, the per man, per day pension obligations were continuously escalating.

The District Court opinion flouts the holding of *Connell* and pretends that Commerce had unsuccessfully expended its trial time attempting to prove "that the TSC and MSC negotiated improperly for the benefit of the larger companies vis-a-vis the smaller companies . . . " (1413a). The District Court thereby rejected Commerce's contention that the restraint-on-transfer clauses should have at least been presented to the independents,[14] and also rejects without any discussion of the specifics Commerce's claim that illegal motivation, if required, was amply demonstrated by the extensive private negotiations between the MSC/TSC and the unions in 1968-69; the MSC/TSC request for inter-union meetings between the various seagoing unions; the fact that such inter-union meetings were held under most suspicious circumstances; and the testimony of Mel Barisic, Secretary-Treasurer of the Union, who conceded under oath that the NMU had agreed with MSC/TSC, even before the official opening of negotiations, that there would be *one* industry-wide contract (436-37a).

These factors, though not required for proof of Commerce's *per se* antitrust claims, are relevant to determining the overall circumstances impacting on the arrangement. If this is "normal" behavior for a multi-employer group which does *not* represent all of the employers in the industry, then perhaps it is time to rethink the judicially created exemption which allows employers to act "in combinations" otherwise unlawful for the limited purposes of collective bargaining. In the maritime industry particularly, pension arrangements have a history of being used as thinly-veiled disguises for the illegal pooling of employer financial obligations. See *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261 (1968). The circumstance that such arrangements originate in collective

14. The District Court deals with this by stating that Commerce effectively permitted the MSC/TSC negotiators to act as their *de facto* representatives. True enough, the independents did expect MSC/TSC to take the lead in negotiating wages, hours, and other terms and conditions of employment. However, it does not follow that by this procedure Commerce or any other independent would purely voluntarily ratify an illegal hot cargo clause.

bargaining does not automatically create an antitrust exemption. *Id.* at 314, fn. 29 (Douglas, J. dissenting).

Causation

Section 4 of the Clayton Act, 15 U.S.C. §15 provides that "any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee . . .".

The NMU contends that notwithstanding any antitrust violations which may have been committed by it, Commerce was not damaged "by reason thereof" but only by reason of the injunction. The District Court in a one-sentence no-authority holding endorses the union view (1432a).

Commerce contends that the District Court erred on the facts and on the law. It is true that but for the arbitral award and preliminary injunction *enforcing* the restraint-on-transfer provision of the NMU industry-wide agreement, substantially all of the damage suffered by Commerce might have been avoided. But, it is equally true that *but for* the illegal clause, there would have been no arbitration and no preliminary injunction.

Moreover, the evidence clearly demonstrated that during the pendency of the preliminary injunction, other aspects of the illegal NMU combinations which were not the subject of any judicial order impacted on the ship sales market reducing the value of the BARBARA and thereby increasing Commerce's losses. Thus:

(i) NMU companies unwilling or unable to retain MEBA engineers could not buy the vessel;

(ii) NMU companies unwilling or unable to retain the affiliated Masters and Pilots Union could not buy the vessel;

(iii) United States flag companies able and willing to deal with all the necessary unions were unable to buy the vessel unless they would also participate in the industry-wide pension funding schemes; and

(iv) Even those United States companies able and willing to retain all the necessary unions, and participate in all the necessary industry-wide pension fundings, had to consider the impact on the value of the vessel presented by the "voluntary" contractual restrictions on resale.[15]

It is uncertain to what extent Commerce's losses might have been lessened if the NMU had acted alone and not in combination with the supervisory unions in effecting these illegal clauses.[16] The facts demonstrate, however, that once the industry-wide scheme was effected, even potential foreign flag buyers were "afraid" to purchase the vessel in the absence of "assurances" from the unions. The District Court erred when it utterly failed to consider the extent to which these factors caused Commerce's losses.

This appears to be a case of first impression in this circuit with regard to the legal issue of whether an "injunction" is an "intervening" event excusing for purposes of liability antitrust violations which are part and parcel of the conduct enforced by the order of preliminary injunction. At trial, the NMU relied upon *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544 (E.D. Pa. 1962). In *Fiumara*, the plaintiff instituted federal antitrust claims after the conclusion of a state court proceeding in which orders

15. Within a year after its purchase of the BARBARA, the buyer was economically required to transfer the vessel to foreign flag status and did so without objection from the NMU.

16. It is not Commerce's burden to offer such proof. It is sufficient that the NMU conduct was a "material cause" or "substantial factor" in the resulting injuries. *Billy Baxter, Inc. v. Coca Cola Company*, 431 F.2d 183, 187 (2d Cir. 1970). The wrongdoer must "bear the burden of proof on the issue of casualty," *Klinger v. Baltimore and Ohio Railroad Company*, 432 F.2d 506, 516 (2d Cir. 1970).

of preliminary and permanent injunctive relief requiring plaintiff's compliance with defendant's retail minimum price schedules had issued. The District Court held that "injuries resulting from compliance with an injunction, even if improperly obtained, cannot support a recovery in a private antitrust suit." 204 F. Supp. at 547. And, in dismissing a claim for legal fees, the Court held that this was particularly appropriate "when such alleged [antitrust] violation was not raised in defense of the state court injunction proceedings." *Id.* at 548.

The *Fiumara* holding cited an earlier Third Circuit case dismissing as "moot" an antitrust complaint by a grower of tomatoes who had complied with a mandatory injunction to sell his crop to a particular party after a prior proceeding in which the District Court held that the contract clause requiring such sale was valid. *Campbell Soup Co. v. Martin*, 202 F.2d 398 (3d Cir. 1953). See also *DiGaetano v. Texas Company*, 300 F.2d 895 (3d Cir. 1962).

Two distinctions between these authorities and the instant case immediately appear:

(i) In each of the Third Circuit cases[17] the injunction was proper; here it is wrongful *ab initio*;

(ii) In the Third Circuit cases the complainants raised their allegations of antitrust violations in separate proceedings[18] commenced *after* the injunction issued; here Commerce immediately claimed for relief under the antitrust laws in the same case and *before* the preliminary injunction issued.

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17. The underlying general principle of *damnum absque injuria* is no longer valid in the Third Circuit. *Infra*, p. 31.

18. On parallel facts, in *Janel Sales Corp. v. Lanvin Perfumes, Inc.*, 396 F.2d 398, 401 fn. 2 (2d Cir. 1968), this Court recognized that the remedy for an erroneous state court decision properly rests in the state court.

Do these distinctions make any difference? In Commerce's view they do by the most basic understanding of the meaning of a *preliminary* injunction. A preliminary injunction is "by its very nature, interlocutory, tentative, provisional, *ad interim*, impermanent, mutable, not fixed, or final or conclusive, characterized by its for-the-time beingness. It serves . . . to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).

In 1971, both Judges Wyatt and Frankel recognized that Commerce's antitrust claims were substantial. Judge Frankel *preliminarily* estimated that the "overwhelming probabilities" favored the union view that their contract was exempt from the antitrust laws. On a full trial in 1975, this estimate was proven to be incorrect.

To say now that the damages were caused by the Court's erroneous *preliminary* estimate of the union's probabilities of ultimate success rather than by the union's overt acts in making and enforcing the illegal agreements, is a direct repudiation of the meaning of the word "preliminary" because it makes "permanent" the erroneous relief obtained by the union and deprives Commerce *forever* of its remedy for the antitrust violations.

POINT II

THE DISTRICT COURT ERRED IN LIMITING COMMERCE'S RECOVERY AGAINST THE NMU TO THE AMOUNT OF THE INJUNCTION BOND ($10,000) IN THAT THE PROVISIONS OF RULE 65(c) REQUIRING THE POSTING OF A BOND FOR SECURITY DO NOT EXPLICITLY OR IMPLICITLY ESTABLISH A LIMITATION AND THE PROVISIONS OF THE NORRIS-LA GUARDIA ACT APPLICABLE TO ALL LABOR DISPUTES CONTRAVENE ANY SUCH LIMITATION.

Rule 65 of the Federal Rules of Civil Procedure provides:

> "(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof."

The District Court holds in this case that the word "security" means "in full payment" and that the amount of security required by Judge Frankel of the NMU on obtaining the injunction is the limit of the union's liability, despite the gross inadequacy of that sum to compensate the commercial parties for the damages suffered in this case.

The District Court's view is supported by certain precedents. The precedents have been severely criticized by the commentators. See generally, Metzger and Friedlander, *The Preliminary Injunction: Injury Without Remedy?,* 29 The Business Lawyer 913 (April 1974); Note, *Interlocutory Injunctions and the Injunction Bond,* 73 Harvard Law Review

333 (1959); and Note, *Recovery of Damages on Injunction Bonds*, 32 Columbia Law Review 869 (1932)

In 1972, the Third Circuit Court of Appeals extensively reviewed the law and held that in any case involving a labor dispute, the liability of the plaintiff, though not of any surety, for loss, expense, or damage, including attorneys' fees, under Section 7 of the Norris-LaGuardia Act, shall be fixed without regard to the amount of any injunction bond. *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3rd Cir. 1972), *cert. denied*, 408 U.S. 923 (1972). Here, the District Court held that notwithstanding the *Steel Corp.* case, the injunction had issued in a Rule 65 proceeding[19] and that, therefore, the *Steel Corp.* case did not apply or that prior contrary authorities presented a better view.

Close examination of the precedents indicates that the rule limiting the liability of a party which secured a wrongful injunction to the amount of the injunction bond was born out of two early United States Supreme Court decisions, *Russell v. Farley*, 105 U.S. 433 (1881) and *Meyers v. Block*, 120 U.S. 206 (1887). In *United States Steel Corp., supra*, the Third Circuit rejected the injunction bond limitation rule, explaining that both the *Russell v. Farley* and *Meyers v. Block* decisions emanated from the judicial division of courts into courts of equity and courts of law. Equity courts were not capable of granting damages. *Bein v. Heath*, 53 U.S. (12 Howard) 168, 178-179 (1851). It was in that context that the Supreme Court carved an exception to the limits of equity court power such that in order to give complete relief, a court of equity could enter judgment on an injunction bond. *Russell v. Farley, supra.* But, in the absence of an injunction bond, *a court of equity* was powerless to remedy the wrongful injunction. *Meyers v. Block, supra.*

19. In fact, this was not a Rule 65 proceeding, but only treated as such by Judge Frankel. In any event, Rule 65(e) plainly provides that the FRCP did "not modify any statute of the United States relating to . . . injunctions in actions affecting employer and employee . . ."

The District Court held that this circuit adopted the injunction bond limitation rule. *In re Spencer Kellogg & Sons*, 52 F.2d 129, 131 (2d Cir. 1931).[20] In fact, *Spencer Kellogg*, while quoting *Meyers v. Block* with favor, is not really a wrongful injunction case at all. Rather, it was an employee injury case in which plaintiffs seeking to escape the limits of the New Jersey Compensation Act alleged that defendant had repudiated its obligations under the Compensation Act by failing to make required payments during the pendency of the litigation, and this circuit noted that the defendant was merely complying with the (erroneous) preliminary order that the company "need not pay at once." 52 F.2d at 134. For the defendant in *Spencer-Kellogg* to have been required to forego the beneficial limitations of the Compensation Act when it stood ready to make the plaintiffs whole for the *full amount of the payments* due thereunder, would have been an "unjust enrichment" of the plaintiff. *In re Spencer-Kellogg* is a sensible decision despite its broad dicta. It is certainly not a binding precedent as to whether the word "security" in Rule 65(c) should be judicially construed to mean "in full payment."

Rule 65(c) requires that "proper" security be posted upon the securing of a restraining order or preliminary injunction. Normally, the amount of the bond will be adequate to compensate the party wrongfully enjoined for its damages because the Court issuing the injunction will fix the bond mindful of the possibility of error on its part. When the matter was before Judge Frankel, Commerce requested that in the event an injunction was issued, a bond of $2,750,000 be required of the union. Judge Frankel was not mindful of the possibility of error on his part and fixed the bond at a nominal $10,000. Later, on motion before the Rule 8 panel, Commerce asked that the bond be increased. The Rule 8 motion was denied by a panel of this Court "without prejudice" (191a). In effect, the NMU now claims that the decision of the Rule 8 panel was "with prejudice."

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20. But *cf. Osage Oil & Ref. Co. v. Chandler*, 287 F. 848 (2d Cir. 1923).

If Congress had intended that the "security" requirement of Rule 65(c) be fixed as a limitation on the recourse of a wrongfully enjoined party, it could have said so in clear and unmistakable language.[21] In every other legal context, a "security" device "secures" the protected party against default by the one who posts security. Of course, as to the surety, its liability is limited to the amount of the bond. The question here is the obligation of the *principal*, not of the surety.

In the NMU's counsel's affidavit filed on February 22, 1971, the union assured Judge Frankel that in the event the injunction was issued, Commerce would not be harmed because it could simply resell the vessel to an NMU company and that *negotiations to that end* were actually in progress (71a). This sworn statement was baseless. It was only one of many ways in which the NMU misled Judge Frankel. Who shall "pay" for the damage caused by the *enforcement* of the restraint-on-transfer clause *pendente lite?* Shall it be the party which negotiated the clause or the party which *never* consented to it? The party which enforced the clause or the party which sought to avoid enforcement? The party that "fooled" the judge or the party which was the victim of the union's misrepresentations? The party which was *unwilling* to submit the jurisdictional dispute to the NLRB or the parties which took the dispute to the agency vested by Congress with exclusive jurisdiction?

The answer to these questions appears so obvious that one wonders how so many courts could have enforced a bond limitation in other disputes. Commerce respectfully suggests that the theory that there could be no recourse from injuries caused by a judicial error emanates from the proposition that the judge who rendered the ruling was himself free of liability. See generally, *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 20 L. Ed. 646 (1871). This

21. Is the United States and its officers and agents "exempt" from liability for wrongful injunctions or is the provision of 65(c) excusing the United States from the bond requirement simply an indication that Congress felt it unnecessary for the Government to demonstrate its financial worthiness?

emphasis on the sanctity of judicial proceedings resulted in the extension of the immunity to others, *i.e.*, prosecutors, engaged in the judicial process. See *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926) *aff'd per curiam*, 275 U.S. 503 (1927). Likewise, the doctrine of injunction bond limitation extended the absolute judicial immunity of the judge who fixed the bond to the litigant which secured the improper injunction on the theory that the "wrong" was caused by the judicial act rather than by the party which sought and obtained the injunction. But, even under modern Supreme Court analyses of the doctrine of judicial immunity, the injunction bond limitation rule must fai

The absolute immunity of judges has been reaffirmed in suits arising under the Civil Rights Laws. *Pierson v. Ray, supra.* But, the interposition of an erroneous judicial act exempt from prosecution has been held not to automatically extend the immunity to others involved unless such persons affirmatively prove their good faith and reasonableness. 386 U.S. at 555. See also *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The NMU did not plead or prove any defense of immunity or injunction bond limitation. The District Court applied the injunction bond limitation rule mechanically as if it was an absolute, as opposed to a qualified, immunity.

In summary then, it is seen that the injunction bond limitation rule developed from historically misconstrued Supreme Court precedents; that the rule was not expressly incorporated in the congressional adoption of Rule 65(c); that the rule has never been adopted by this Circuit; that this is an appropriate case to abandon continued adherence to an unjust equation which punishes the law-abider and rewards the law-breaker; and finally that even if such a rule exists, it may not be availed of by the NMU without the union having affirmatively proved its good faith and reasonableness, which the union did not and cannot do.[22]

22. See particularly colloquy between Judge Griesa and NMU counsel contained in the appendix at pages 901-13a.

POINT III

THE DISTRICT COURT ERRED IN FAILING TO CONSIDER WHETHER UNDER THE FACTS OF THIS CASE, IMPOSITION OF THE INJUNCTION BOND LIMITATION DEPRIVED COMMERCE OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

The District Court erred in failing to consider the constitutionality of the application of the injunction bond rule to limit Commerce's damages to $10,000.

The Fifth Amendment to the Constitution provides:

> "No person shall be . . . deprived of life, liberty or property without due process of law . . . ".

This language provides a constitutional guarantee of the prior application of procedural due process requirements to any situation involving the taking of a person's property. Determinations that dispose of property with finality must be preceded by adequate notice and opportunity for a fair hearing. *Fuentes v. Shevin*, 407 U.S. 67 (1973); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Fuentes, supra, is particularly analogous to the case at bar. In order to garnish a debtor's wages prior to a judicial determination of the parties' legal rights, a Florida statute required a bond be posted in the amount of double the value of the property to be taken to secure the defendant in the event that the seizure be found unjustified. Justice Stewart's opinion emphasized that the bond required of the plaintiffs was not a substitute for a prior hearing. Commerce contends that if it is limited now to the $10,000 bond fixed by Judge Frankel when he *erroneously* granted the order of preliminary injunction, that limitation would deprive Commerce of its constitutional right to

procedural due process as Commerce was not afforded a full and fair opportunity to present its side of the case, either before Referee Kheel, or before Judge Frankel. The constitutional question posed by this case is: If a more than adequate bond cannot be a substitute for a temporary taking of property without due process of law, how is it possible that a less than adequate bond can be a permanent substitute for recompense for the wrongful taking of property shown to have been without due process?

Procedural due process was initially denied Commerce by Arbitrator Kheel, who on oral application by the NMU entered, after a no-witness, no-evidence, no-transcript, twenty minute proceeding, an arbitral award of preliminary injunction over Commerce's objection and over its urgent request for an opportunity to present witnesses and prepare briefs which would bring the issues into focus for the arbitrator. The denial of the minimal standards of procedural due process was compounded by the union's application (without notice of motion) for an order of preliminary injunction from Judge Frankel the day before the oral argument, and by the Court's granting such motion *without* a hearing[23] and by Judge Frankel's erroneous determination of many contested factual issues favorably to the union.

On February 23, 1971, Judge Frankel was faced with a difficult decision. If he confirmed the arbitral award of injunctive relief (and confirmation was at least technically inappropriate), the sale of the BARBARA from Commerce to Vantage would be, as Judge Frankel acknowledged, blocked and the valuable Standard Oil ("SoCal") charter permanently lost. On the other hand, if confirmation of arbitral award was delayed, the vessel would be transferred to Vantage and would permanently accrete to its SIU fleetwide unit. In either way, it must have seemed to him that "permanent" justice had to be

23. Rule 65 permits a hearing to be held by the Court on application for a preliminary injunction.

forged in a hurry. Moreover, Judge Wyatt had already determined on a prior motion to allow the commercial parties to proceed with their transaction subject to Vantage's undertaking to be bound by an NLRB determination as to union jurisdiction. A decision by Judge Frankel which was contrary to the considered written opinion of Judge Wyatt, a brother of equal rank on the bench, had to be explained. To "explain" the substitution of his contrary judgment, Judge Frankel "assumed" the accuracy of all of the NMU statements concerning how the controversy arose. Judge Frankel thus determined to stop the sale by heaping a crescendo of blame upon Commerce for its *alleged* conduct. On a full trial, it was proven that Commerce had *never* been given the opportunity to accept or reject the restraint-on-transfer clause; that Commerce had *never* assented to the clause; that Commerce did not comprehend that it was "not allowed" to sell its ships to SIU contracted companies; and that Commerce had not, by stealth or otherwise, been seeking to avoid or evade any NMU jurisdictional claims. In short, Commerce proved that Judge Frankel's preliminary "assumptions" were wrong.[24] These "assumptions" would have been unnecessary if the NMU had made any written or formal presentation to the arbitrator or if it had consented to the 72 hour adjournment requested by Commerce to develop the record. Thus, the NMU itself was responsible for the lack of due process which resulted in the erroneous relief and the inadequate bond, that it now claims to be a limitation of its liability.

Perhaps understandably, Judge Griesa did not choose to become embroiled in this issue, so he chose to ignore it; but he sought to justify the omission by chastising Commerce for not seeking an expedited appeal from the order of preliminary

24 It is an unfortunate irony that as matters developed, it turned out that the only living negotiator of the restraint-on-transfer clause was Mr. Edward Silver, who is a former labor law partner of Judge Frankel. Although Commerce does not claim any ethical impropriety in Judge Frankel's hearing the original motion to confirm, clearly he would not have been an "unbiased" judge for a full trial. "When the constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

injunction, claiming that while it is uncertain what the Court of Appeals would have done had Commerce sought expedited review, he (Judge Griesa), with the advantage of five years of litigation hindsight, could predict that the Court of Appeals would have recognized the emergency at hand and presumably would have vacated the injunction (1427a). This kind of speculation is entirely impermissible and certainly unjustified under the facts of this case.

Importantly, Judge Griesa give short shrift to the facts in his "if you would only have appealed" resolution of the constitutional question. The uncontested facts are: (i) the order of preliminary injunction issued on Thursday, March 4, 1971; (ii) the Vantage - SoCal charter was due to expire Friday, March 5th and Commerce had no way of extending that charter; (iii) on Monday March 8th through late into the night Wednesday, March 10th, Commerce was seeking either to get a replacement charter for the BARBARA for its own account or to secure a satisfactory commercial arrangement which would have allowed Vantage to make a late tender of the vessel to SoCal; and (iv) on noon Thursday, March 11th, SoCal cancelled the charter because of the injunction and union problems.

The District Court found that the evidence shows that at least through the end of March, SoCal *would* have chartered the BARBARA (1423a). There is no such evidence in this record.[25] On March 29th, Commerce met with NMU representatives and informed them that economic conditions were such that the vessel already could not have been sold to any United States flag operator, other than to Vantage under the existing contract. The NMU representatives did not question the accuracy of that fact when they said "they would prefer the vessel go foreign rather than to the rival union SIU."

25. A minor witness testified in passing that SoCal had inquired as to the status of the vessel in late March. Since no party was attempting to prove that the SoCal charter could be revived in late March, there was no contest with respect to this testimony, and the District Court's reliance upon it as a "prop" to guess what the Court of Appeals *would* have done makes that speculation even more suspect.

In point of fact, all of the damage to Vantage and a great deal of the damage to Commerce occurred within days after the order of preliminary injunction. Commerce did not seek expedited appeal in that period because (a) it didn't think there was adequate time to save the SoCal charter; and (b) it was afraid that in the absence of the development of a full record demonstrating Judge Frankel's factual errs, there was a real danger of summary affirmance by the Circuit Court which would have further complicated the pending unfair labor practice charges against the union before the NLRB, the agency charged with *exclusive* jurisdiction over such matters.

On numerous occasions both before and after March 4th, Commerce requested that the Labor Board proceed with all due deliberate speed in acting upon those charges. At least twice it was assured that the charges would be promptly filed. Ultimately, on May 24th, a complaint issued. On May 27th, Commerce noticed a motion for vacation of the preliminary injunction pursuant to Rule 62(c) of the FRCP. On June 22nd, Judge Croake opined that he would grant the 62(c) motion while (erroneously) denying the Board's request for a 10(L) injunction. After a tardy NMU motion for reargument, Judge Croake reversed this determination despite NMU counsel's delay "in order to save the issue for appeal." Commerce immediately moved before this Court pursuant to Rule 8 of the FRAP asking for vacation of the injunction or an increase in the bond.

The District Court opinion ignores the proceedings before Judge Croake, closing its eyes to those events because they are inconsistent with the holding that Commerce was laggard in extending its time for filing its appendix and appellate brief from Judge Frankel's determination. Importantly, no appeal from Judge Frankel's ruling would have been required if Judge Croake had not erroneously denied the 10(L) petition. The 10(L) proceeding was the proper *direct* attack upon restraint-on-transfer; appeal from the preliminary injunction was a clearly collateral proceeding. Of even greater relevance is the fact that

there is no evidence to indicate that Commerce was proceeding in anything other than the course it *reasonably* believed to be the *fastest* possible route for undoing the *fact* of the wrongful injunction. The District Court's discussion of Commerce's delay in the appellate process is grotesquely unfair and irrelevant to the real issue: Is the application of the so-called injunction bond rule as a limitation of damages in this case constitutionally compatible with procedural due process? Commerce respectfully submits that it is not.

POINT IV

THE DISTRICT COURT ERRED IN DENYING TO COMMERCE A JUDGMENT AGAINST THE NMU UNDER SECTIONS 301 AND 303 OF THE LMRA IN THAT THE NMU EFFECTIVELY "FORCED" THE VOID AGREEMENT UPON COMMERCE, "RESTRAINED" COMMERCE FROM DOING BUSINESS WITH VANTAGE, AND REFUSED TO BARGAIN IN GOOD FAITH WITH RESPECT TO COMMERCE'S REQUEST FOR DISPENSATION UNDER THE CLAUSE.

The District Court also rejected the claims of Commerce under Sections 301 and 303 of the LMRA, 29 U.S.C. §§ 185, 187, relying, in respect of the 303 claim, on the Fifth Circuit decision in *Local Union No. 48 v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964) to the effect that "resort to a court for a judicial remedy is not coercion" within the meaning of the relevant statute.

Commerce submits that the Court below erred in that it failed to read § 303 against the background of Congressional intent that all secondary boycott agreements are void and all union action to force unwilling employers to comply with such agreements be actionable for damages; that the Court below further erred by ignoring the evidence that the clause was forced on Commerce by the manner in which it was adopted and that

Commerce obeyed the clause and refused to transfer the vessel without a written undertaking during the period through February 8, 1971; and finally, the Court erred in disposing in a footnote of Commerce's claim that the union violated its contractual obligation to bargain in good faith with Commerce concerning dispensation under the provision.

Section 8(b)(4) of the NLRA, 29 U.S.C. §158(b)(4) was first enacted as part of the Taft-Hartley bill in 1947. While the legislative history reflects broad statements condemning the evils of all forms of secondary boycotts, the specific provisions of the legislation as originally enacted only barred unions from inducing employ*ees* from engaging in strikes or other forms of concerted activity where an object thereof was to force or require an employer to cease doing business with a third person. The Supreme Court subsequently held that boycotts "voluntarily" engaged in by a secondary employer were not covered by the statute. *Local 1976 United Bhd. of Carpenters v. N.L.R.B.*, (Sand Door), 357 U.S. 93, 98-99 (1958). Congress immediately acted to close the legislative loophole. As part of the Landrum-Griffin Act, Congress amended 8(b)(4) adding *inter alia* subsection (II) which broadened the acts prohibited to be taken by unions to include all "threats, coercion or restraint" having an illegal secondary objective and by creating the Section 303 right of recovery of damages for all violations of 8(b)(4); and adding Section 8(e), 29 U.S.C. §158(e) which outlawed "voluntary" secondary boycott agreements except in certain facets of the construction and garment industries.

The anomaly that the construction industry unions could "voluntarily" obtain secondary boycott agreements from willing employers so long as no threat, coercion, or restraint was utilized to obtain or enforce the agreement has led to much litigation on the issue of whether arbitral or court proceedings to enforce such voluntary secondary boycott understandings is prohibited by §8(b)(4)(ii). The Fifth Circuit decision in the *Hardy*

case cited by the District Court represents one view. But *cf. Acco Construction Equipment, Inc.*, 204 N.L.R.B. No. 115, *mod.*, 511 F.2d 848 (9th Cir. 1975).

The instant case is markedly different from previous authorities for several reasons. First, Commerce *never* knowingly consented or agreed to the restraint-on-transfer clause. When the NMU unilaterally mailed Commerce the final agreement, Commerce rightly perceived that it was "required" to accept the entire agreement or else its vessels would be struck and it would be forced to go out of business (E107-10). The union did not specifically bring the restraint-on-transfer provision to the attention of Commerce (or any other independent employer) so that an express threat of strike was not actually communicated in so many words, but it was there nonetheless (439a).

Second, none of the prior cases involved *injunctive* enforcement of a clause arguably violative of Section 8(e). Even if some legitimate policy considerations do exist to justify permitting a union to seek enforcement through *damage* actions of employer violations of clauses later found to be void under Section 8(e), such considerations are entirely absent when the union insists upon — and obtains from a friendly "arbitrator" — specific enforcement of the void clause *pendente lite*. In the *Connell* case, the learned dissenting opinion of Mr. Justice Stewart states in pertinent part that:

> "If Connell and Local 100 had entered into a purely voluntary 'hot cargo' agreement in violation of §8(e), an injured nonunion mechanical subcontractor would have no §303 remedy because the union would not have engaged in any §8(b)(4) unfair labor practice. The subcontractor, however, would still be able to seek the full range of Board remedies available for a §8(e) unfair labor practice. Moreover, if

> Connell had truly agreed to limit its subcontracting without any coercion whatsoever on the part of Local 100, the affected subcontractor might well have a valid antitrust claim on the ground that Local 100 and Connell were engaged in the type of conspiracy aimed at third parties with which this Court dealt in Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939."
>
> * * *
>
> "On the other hand, the signatory of a purely voluntary agreement that violates §8(e) is fully protected from any damage that might result from the illegal 'hot cargo' agreement by his ability simply to ignore the contract provision that violates §8(e). If the union should attempt to enforce the illicit 'hot cargo' clause through any form of coercion, the employer may then bring a §303 damage suit or may file an unfair labor practice charge with the Board. See 29 U.S.C. §158(b)(4)(B). Since §8(e) provides that any prohibited agreement is 'unenforcible and void,' any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing." *Connell, supra,* p. 2, 421 U.S. at 649-50, fn. 9.

By his decision in this case, Judge Griesa says that Justice Stewart is wrong.[26] Unions can, *with impunity,* obtain *specific enforcement* of hot cargo agreements *void* under Section 8(e) and the parties damaged thereby may not be heard to complain under either the antitrust or the labor laws, even if the damaged

26. The specific language of Justice Stewart's opinion was brought to the District Court's attention, but not dealt with by the District Court.

party had not been a "purely voluntary" party to the arrangement.

Finally, even under the District Court's standard, there was ample evidence to find that implicit threats of strike or other labor strife actually prevented a commercial resolution of the controversy. On February 6th (two days before the arbitration award of injunction), Commerce was unwilling to tender the vessel, then in New York, to Vantage without an undertaking from Vantage to "take care" of the NMU (E66). Commerce acted thusly because the NMU had the power to strike or otherwise prevent the vessel from being transported to Mobile, Alabama where physical delivery of the vessel had been promised. The implicit threat to strike contained in the clause is as violative of §8(b)(4) as any actual strike.[27] *Electrical Workers Local 769 (Ets-Hokin Corp.),* 154 NLRB 839, *enfd.,* 405 F.2d 159 (9th Cir. 1968).

The District Court also found in a footnote that Commerce was not suing the NMU for violation of contract under Section 301, 29 U.S.C. §185. Commerce did assert such claims (270a) and does seek relief under Section 301 based upon the union's refusal to deal with it in good faith.

As parties to a collective bargaining agreement, Commerce and the NMU were each bound to deal in "good faith" as to all matters impacting on their contractual relationship. Commerce contends that the NMU breached the collective bargaining relationship and violated the duty to bargain in good faith by (i) unilaterally imposing the restraint-on-transfer clause in February of 1970; and (ii) refusing to negotiate in good faith with respect to Commerce's requests in February, March and August of 1971 for relief from the clause. The union's rigid and unbending

27. The District Court did not deal with the "restraint" prior to February 8th, because Judge Griesa erroneously found that Vantage did not enter into the SoCal charter until February 8th — the same day the arbitration occurred (1418a). All the evidence demonstrated beyond any doubt that the SoCal charter was entered into on January 25th (E147). Indeed, the NMU so stipulated (1314a).

insistence upon enforcement of a clause later held to be invalid is a breach of the duty to bargain in good faith. See *Associated General Contractors of America, Evansville Chapter, Inc. v. NLRB*, 465 F.2d 327 (7th Cir. 1972). And, such conduct is not excused by reliance upon an invalid arbitration award. *Sperry Systems Management Division, Sperry Rand Corp. v. NLRB*, 492 F.2d 63 (2d Cir. 1974). In Section 301 cases, federal courts have wide latitude to fashion appropriate remedies. *Vaca v. Sipes*, 386 U.S. 171 (1967).

CONCLUSION

For all of the foregoing reasons, it is urged that the judgment below be reversed and that the case be remanded to the District Court with appropriate instructions to the Court as to the law to be applied in assessing damages against the NMU.

Respectfully submitted,

D. DAVID COHEN
Attorney for Defendant-Counterclaimant-Appellant

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

COMMERCE TANKERS CORP.,
Defendant-Counterclaimant- Appellant,
and
VANTAGE STEAMSHIP CORP., INTERVENING Defendant- Appellant,
- against -
NATIONAL MARITIME UNION OF AMERICA, AFL-CIO.,
Plaintiff- Appellee.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the **28** *day of* **July** *1976 at* **1) 346 West 17th Street, New York, New York**
2) 500 Fifth Avenue, New York, New York

deponent served the annexed Brief *upon*

1) Abraham E. Freedman
2) Surrey Karasik Morse & Seham

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **28**
day of **July** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer
Reuben Shearer

CERTIFICATE OF SERVICE

76-7217
Re: Commerce Tankers Corp v. Vantage Steamship Corp. v. National Maritime Union of Amer.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Defendant-Counterclaimant-Appellant.

That on the 15th day of September, 1976, I served the within Reply Brief for Defendant-Counterclaimant-Appellant in the matter of Commerce Tankers Corp. v. National Maritime Union of Amer upon

Phillips and Capiello
346 West 17th Street
New York, New York 10011

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 15th day
of September 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.
LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977